BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALICIA MOORE	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,319
DOLD FOODS, INC.	)	
Respondent	)	
Self Insured	)	

ORDER

Claimant appealed the March 8, 2001 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on August 10, 2001, in Wichita, Kansas.

APPEARANCES

John C. Nodgaard of Wichita, Kansas, appeared on behalf of claimant. Douglas D. Johnson of Wichita, Kansas, appeared on behalf of respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a series of accidents and injuries ending on August 29, 2000, the last day worked, which resulted in permanent injury to claimant's bilateral upper extremities. In the Award, Judge Frobish found claimant was entitled to a 4 percent permanent partial general disability award based upon the 12 percent functional impairment rating given by Pedro A. Murati, M.D., and the zero percent rating by Frederick R. Smith, D.O. After the injury, claimant was terminated for refusing to return to an accommodated job with respondent that would have paid a wage comparable to that which she was earning at the time of her injury. Dr. Smith viewed a videotape of the jobs that were available and determined that claimant could at least perform the sealing job. Dr. Murati determined that all of the jobs were too repetitive and, therefore, outside

claimant's restrictions. Judge Frobish concluded that claimant could have performed at least one of the jobs that was offered if the tasks were rotated and further concluded that task rotation would have been available. Judge Frobish held claimant was, therefore, not entitled to an award based on a work disability.

Claimant contends Judge Frobish erred by failing to recognize that all of the accommodated jobs respondent offered violated the written restrictions Dr. Smith had given claimant and in failing to award claimant a work disability.

Respondent contends that the ALJ's Award should be affirmed in all respects.

The nature and extent of claimant's disability is the only issue for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because a bilateral extremity injury is an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e.[1] That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[2] and Copeland.[3] In Foulk, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes

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[1] *See* Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, 947 P.2d 1 (1997).

[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

The question becomes whether claimant made a good faith effort to perform the accommodated job with respondent following her release to work after the injury. If claimant failed to make a good faith effort, or unreasonably refused to perform appropriate work as in Foulk, then claimant is precluded from receiving an award based on a work disability.[5] It should be remembered, however, that in Foulk, there was a serious question about the claimant's credibility. Claimant's testimony that she could not perform the accommodated job was contradicted by a videotape showing claimant performing activities she had testified she was unable to do. Her credibility was, likewise, important to the question of the appropriateness of her restrictions, because the physician acknowledged they were based primarily on claimant's subjective complaints. Here, unlike in Foulk, the Board finds claimant to be credible. The test remains one of good faith, however, on the part of both claimant and respondent.[6]

Following her injury, respondent offered to return claimant to work in an accommodated position. Because of her injuries, claimant did not believe she could perform any of the jobs respondent offered. Although claimant disputes the reasonableness of the accommodations, the record fails to establish that respondent acted unreasonably or in bad faith.[7] Likewise, the Board finds that claimant's refusal to perform the accommodated work with respondent was done in good faith. A claimant may make a good faith effort and still be unable to perform accommodated work.[8] A claimant may, for example, be assigned work which does not exceed medical restrictions but which is beyond the claimant's ability or causes her symptoms to worsen. In spite of good faith

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[4] Copeland at 320.

[5] *See* Swickard v. Meadowbrook Manor, 26 Kan. App. 2d 144, 979 P.2d 1256 (1999); Ramirez v. Excel Corporation, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___ Kan. ___ (1999).

[6] *See* Helmstetter v. Midwest Grain Products, Inc., ___ Kan. App.2d ___, 18 P.3d 987 (2001), and Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999); Tharp v. Eaton Corp., 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] *See* Ford v. Landoll Corporation, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* ___ Kan. ___ (2000), and Niesz v. Bill's Dollar Stores, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

[8] *See* Guererro v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

efforts, the claimant may not perform the job adequately. In the present case, the Board cannot conclude claimant did not exercise reasonable judgment or did not act in good faith in refusing to return to the offered accommodated work. She certainly made known her concerns and reasons for refusing to even attempt the work. Her concerns were based upon her years of experience with respondent, and her personal knowledge of the jobs offered and of her physical condition. The jobs respondent was offering were essentially the same tasks claimant had performed before and which had caused or contributed to her injuries. In addition, despite the explanation given by Dr. Smith for his acquiescence, all of the accommodated jobs clearly violated his written restrictions.[9]

As to claimant's subsequent job search efforts, the Board finds claimant acted in good faith accepting a job that was less than 40 hours per week. The Board is mindful that respondent has renewed its offer to claimant for full-time work, but this offer came long after claimant had accepted other employment.[10] Furthermore, respondent has never explained how it will accommodate Dr. Smith's restriction against claimant working in a cold environment. Accordingly, claimant should not be limited to a permanent partial disability award based upon her impairment of function. Claimant is entitled to a work disability award.

As required by K.S.A. 44-510e(a), the Board will give equal weight to the 50 percent task loss opinion given by Dr. Murati and the claimant's 68 percent actual wage loss and find claimant has a 59 percent permanent partial disability. Finally, the Board does not consider the zero percent impairment rating given by Dr. Smith to be credible in view of his permanent restrictions and, therefore, adopts the 12 percent impairment of function opinion of Dr. Murati.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated March 8, 2001, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Alicia Moore, and against the respondent, Dold Foods, Inc., for an accidental injury which occurred August 29, 2000 and based upon an average weekly wage of $660.03 for 16.6 weeks of temporary total disability compensation at the rate of $401.00 per week or $6,656.60, followed by 232.78 weeks at the rate of $401.00 per week or $93,343.40, for a 59% permanent partial general disability, making a total award not to exceed $100,000.00.

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[9] *See* Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[10] *See* Edwards v. Klein Tools, Inc., 25 Kan. App. 2d 879, 974 P.2d 609 (1999).

As of August 14, 2001, claimant is entitled to 16.6 weeks of temporary total disability compensation at the rate of $401 per week totaling $6,656.60, followed by 33.4 weeks permanent partial disability compensation at the rate of $401 per week totaling $13,393.40, for a total due and owing of $20,050.00, minus any amounts previously paid. Thereafter, claimant is entitled to 199.38 weeks permanent partial disability compensation at the rate of $401 per week totaling $79,950.00 until fully paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Wichita, KS
Douglas D. Johnson, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director